PRACTITIONER COMMENT

Negotiator's Toolbox

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As a business lawyer negotiating agreements, and as a human being negotiating the perils of everyday life, I have accumulated a box full of negotiator's tools. To each tool I have given a name that evokes its origin. Though the form of each name is possessive, I am not. Here is the full toolbox, with each tool laid out and described in the order you might use it as you move from inquiry and analysis through bargaining and on to resolution:

Stephens's Rule	Ockham's Razor
Chomsky's Bathysphere	Manning's Law
Smiley's People	Mule's Mind
Lincoln's Penny	Watson's Reminder
Smythe's Chart	Von Neumann's Minimax
Roosevelt's Maxim	Prisoner's Dilemma

I. STEPHENS'S RULE

Charles Stephens taught me math at Hawken School. To teach students that it is essential first to understand the question posed and then to use the information offered, he would say, "Don't just read the problem. READ the problem." As he said this, he would write "READ" in four-foot high letters across two blackboards.

Restated for the negotiator, Stephens's Rule has two components. (1) "Don't just listen to the client. LISTEN TO THE CLIENT." If you do not know what the job is, you cannot do it. (2) "Don't just get the facts. GET THE FACTS." It is surprisingly easy to gallop off to the negotiation right past the roadside stand that offers "Basic Information—Yours for the

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Asking." Better to stop awhile and inquire. Strategy without reconnaissance is wishful thinking. Theories propose; facts dispose.

II. CHOMSKY'S BATHYSPHERE

Noam Chomsky urged exploration of both the "deep structure" and the "surface structure" of language.

> The deep structure of a sentence is the abstract underlying form which determines the meaning of the sentence; it is present in the mind but not necessarily represented directly in the physical signal. The surface structure of a sentence is the actual organization of the physical signal into phrases of varying size, into words of various categories, with certain particles, inflections, arrangements, and so on.[1]

Thus, the deep structure of the sentence, "Jill fills the bill!" is the following thought sequence: the speaker excitedly states that Jill is a good choice to perform the task at hand. The metaphorical surface structure would give fits to a foreigner learning English, for it borrows from old contracting practices the notion of a "bill" of requirements to be performed exactly and from modern pharmacy the image of "filling" a prescription.

William Beebe was a tropical ornithologist of broad curiosity and uncommon pluck. In 1930 he built a bathysphere, a hollow steel ball four feet nine inches in diameter weighing five thousand pounds. Inserted into the bathysphere and lowered half a mile into the ocean, he viewed through its line of three portholes a part of the planet never before seen by humans.[2]

To see structure at a certain depth in language, in the sea, or in any ordered system, you must go to that depth and look for it.

As a negotiator, you need only a virtual bathysphere to seek out the deep structure of your bargaining situation. Each issue you confront is shaped by underlying forces. Hunt for the analytical depth at which you can discern the fundamental interplay of those forces. The pattern formed by

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[1] An analogous framing of these definitions can be found in NOAM CHOMSKY, ASPECTS OF THE THEORY OF SYNTAX 135-136 (1965), and Professor Chomsky has confirmed in a communication to the author that the quotation is consistent with his treatment of the subject in the 1960s. However, the author has not been able, in spite of generous assistance from Professor Chomsky, to identify the source from which the author originally drew this quoted material when he began work on this article in 1990. The language has been retained for its clarity and legibility to the layman.

[2] *See* WILLIAM BEEBE, HALF MILE DOWN 92 (1934).

that fundamental interplay is the deep structure which will find some degree of expression in all the structural layers above.

If you construct a profoundly accurate model of your bargaining situation, attending closely to history and emotion, you will rarely be surprised by what people do. You will have accurate expectations.

Also, if you attend to deep structure, you will naturally follow the oft-articulated advice to negotiators—do not bargain over position, bargain to achieve purpose.

III. *SMILEY'S PEOPLE*

George Smiley tried to retire but could not. Circumstances, grippingly rendered by John LeCarré, insisted on Smiley's return to the spy wars. In *Smiley's People*, Mr. Smiley is intermittently effectual on his own, but is resourceful beyond measure in discerning the need for, finding, motivating, mobilizing, deploying, and rewarding others, generally his old friends, who fit perfectly the job at hand.[3]

This is a good model for a negotiator. It is a source of enormous strength to know what you cannot do alone and where you can find the person who can help you do it. Your skills may put you at a comparative advantage in certain facets of the negotiating process, but not likely in all. Complementary skills will be invaluable. Negotiation has its virtuoso moments, but the stronger team is likely to carry the day.

Match task and talent.

IV. LINCOLN'S PENNY

After closing up the store in New Salem where he worked as a clerk, Abraham Lincoln walked miles into the country to return to a woman to whom he had given the wrong change a penny that was owed her. Or was it a nickel? Or did he do it at all? I recall the story but cannot find it in Sandburg's biography[4] or others through which I have paged.

Of course, if Lincoln is reputed to have done such things, the story accurately portrays his reputation, whether the particular event occurred or not. He has become an icon for honesty.

A reputation for honesty—and the reality that underpins it—is of great value to a negotiator.

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[3] *See generally* JOHN LECARRÉ, SMILEY'S PEOPLE (1979).

[4] CARL SANDBURG, ABRAHAM LINCOLN: THE PRAIRIE YEARS (1926).

Or is it? Petty lies are commonplace in the business world. Grand ones are not rare. Unless this mendacity is a habit out of control, its practitioners must think they are being smart. In this blurry context, why strive for rigorous honesty?

Because honesty is tactically effective and strategically essential.

Honesty is tactically effective in that an early indication that you are offering and expect truthfulness fosters an atmosphere of reciprocal good faith. There is no better atmosphere in which to discover real mutual advantage and attain the best available deal.

Does truthful mean open? No. There is a hand to be played. Bluffing is part of the game. Cheating is not. The honest player respects the norms.

What is there to do with dark secrets? Manage them with exquisite care. To be honest in dealing with them is not, of course, to foolishly give them away. It is rather to bargain for space in which they may exist, a space large enough so its very contours do not reveal what is hidden within. If such a space of acceptable nondisclosure cannot be crafted or if the secret is in some fundamental way hostile to the deal, it is probably a deal that should not be done.

Honesty is strategically essential in that the deal is not just the bargain struck. The full deal is the bargain in its living context. The values of the bargain are drawn from and reinforce the values of the people who create it. Over time people become consonant with their deals. If you would have for yourself and your client the benefits of honesty anywhere, you must seek it everywhere.

V. SMYTHE'S CHART

As a young lawyer, I helped out Pete Smythe in one of his real estate deals. Amiable and avuncular, he shared with me this puckish chart:

	Good Deal	Bad Deal
Good People	Great outcome	Tolerable outcome
Bad People	Bad outcome	Disaster

Deals are given life by people. Bad people will ruin a good deal. A moonlit night and beautiful music will not make you happy if you are dancing with a creep.

VI. ROOSEVELT'S MAXIM

Theodore Roosevelt told the Minnesota State Fairgoers in 1901 he was quoting a "homely adage," but the adage so perfectly captured his love of managed force that we now treat him as its author—"Speak softly and carry a big stick."[5]

This is an elegant combination, much to be desired. But what to do when the stick is not so big? Consider the negotiator's corollary: "Speak softly and be perceived to carry a big stick."

Game theory teaches the importance of "correct bluffing." Correct bluffing means sometimes acting, within the bounds of Lincoln's Penny, as if you have a big stick when you do not. Bluffing without dishonesty is necessary lest your manner of play exactly reflect and therefore reveal the limits of your strength.

Pay heed to the downside; plan on acceptable losses when your bluff is successfully called from time to time.

VII. OCKHAM'S RAZOR

William of Ockham was a fourteenth-century English theologian who argued against elaborate religious hypotheses that were no more helpful or persuasive than simple ones. He might have said, "Omit needless angels." He did say, "What can be done with fewer [assumptions] is done in vain with more."[6] Less, if adequate, is better than more. This is known as the principle of parsimony (or economy of explanation) and it was used so well by William to shave away doctrinal stubble that it has come to be known as Ockham's Razor.[7]

In the modern vernacular: "KISS—Keep It Simple, Stupid." Or, as invoked for writers by Strunk and White in their classic *Elements of Style*, "Omit needless words."[8]

To the negotiator mindful of parsimony, simplicity in an agreement is a virtue. A simple structure sufficient to the task is preferable to a complex one. It takes less work to create and is more able to handle vagaries that arise in negotiating and carrying out the deal. Wasted words are just that.

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[5] JOHN BARTLETT, FAMILIAR QUOTATIONS 575 (16th ed. 1992).

[6] 8 ENCYCLOPEDIA OF PHILOSOPHY 307 (Paul Edwards ed., 1967). Note that Occam is a commonly encountered variant spelling of Ockham.

[7] *See id.*

[8] WILLIAM STRUNK & E.B. WHITE, THE ELEMENTS OF STYLE 23 (3d ed. 1979).

VIII. MANNING'S LAW

Bayless Manning, in a splendid article on "hyperlexis," propounds the "Law of Conservation of Ambiguity."[9] That law holds that elaboration of an agreement (or any binding set of words) may push back the frontier of ambiguity but it will create new ambiguities as it does so.[10] This is one frontier that never vanishes. Agreements made out of words will by their nature be of ambiguous application to many possible contingencies. To try to delineate too many solutions in an agreement complicates it and introduces new problems.

The draftsman's ideal, therefore, is not to eradicate ambiguity (which cannot be done) but to move the irreducible ambiguity from areas where it matters into areas where it probably does not matter, indeed, where it may belong.

If an agreement has created good rules for a relationship, the parties will, with such help as they need, resolve in due course those ambiguities they need to resolve. A difficult issue on the periphery may deserve deferral; if the passage of time compels resolution, it is also likely to clarify the consequences of one outcome over another.

Contractual restraint is first cousin to judicial restraint. In dicker or edict, solve no problem before its time.

IX. MULE'S MIND

In Isaac Asimov's *Foundation Trilogy*, the Mule is a mutant being with a rogue mind capable of stripping another brain "clean as any plucked chicken."[11] The Mule is intruding on the effort of the Foundation to hold to one thousand years, rather than thirty thousand years, the barbarian interlude before democratic human culture can be successfully reasserted in the Galaxy. The highest priest of the Foundation visits the Mule and when, for the merest sliver of time, the Mule reduces his guard, the priest inserts into the Mule's mind the element of self-doubt that will bring his mental capacities back within the range of those which the Foundation has anticipated and can manage—and the Mule does not know and will never know his mind has been invaded.[12]

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[9] Bayless Manning, *Hyperlexis and the Law of Conservation of Ambiguity: Thoughts on Section 385*, 36 TAX LAW. 9, 10 (1982).

[10] *See id.* at 11.

[11] ISAAC ASIMOV, SECOND FOUNDATION 92 (Bantam Books 1991) (1953).

[12] *See generally id.*

A mind will not receive an idea unless open to it. Roger Fisher of *Getting to Yes*[13] fame was once asked, "How do you open a closed mind?" His answer: "Listen."[14]

Persuasion is similar to the mind invasion of the Mule in its sensitivity to timing and in its goal of leaving the persuaded party feeling that the acceptance of a commended idea, the undertaking of an action urged, is his or her own act.

X. WATSON'S REMINDER

From Richard Watson, of our firm, I learned the importance of keeping your client free of envy of another's success.

Since life is not a zero-sum game, the event or concession which benefits your adversary in a negotiation is of no necessary disadvantage to you; indeed, it sharpens the desire of the other side to reach agreement, and—if it adds to the overall value created by the transaction—it may well increase the absolute size of your share of the deal. Try to enhance your own outcome, not diminish that of the other party.

XI. VON NEUMANN'S MINIMAX

Life may not be a zero-sum game, but there is enough resemblance so patterns visible in such a game may still provide potent counsel for those who wish to succeed in the mathematically messier real world.

John von Neumann launched mathematical game theory when he and Oskar Morgenstern published *Theory of Games and Economic Behavior*.[15] Von Neumann found that in a two-person zero-sum game (any points I lose you win) it is statistically sound (1) to assume the other side will discover the weaknesses of your position and strategy and (2) to adopt (and try to avoid disclosing) the strategy that will yield the best return if your weaknesses are in fact discovered.[16] That is, respect your adversary's skill

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[13] ROGER FISHER & WILLIAM URY, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN (Bruce Patton ed., 2d ed. 1991).

[14] Roger Fisher, Address to The City Club of Cleveland (Apr. 29, 1983).

[15] JOHN VON NEUMANN & OSKAR MORGENSTERN, THEORY OF GAMES AND ECONOMIC BEHAVIOR (3d ed. 1953). For a lucid and amusingly illustrated treatment of basic elements of game theory, see JOHN MCDONALD & ROBERT OSBORN, STRATEGY IN POKER, BUSINESS AND WAR (1950), on which this discussion of minimax theory is based.

[16] *See* MCDONALD & OSBORN, *supra* note 15, at 64.

and do not reach for an alluring result that can only be attained if your adversary is ineffective. The downside risks of reaching for such a result will often be extreme, and your adversary will often prove to be effective or, at least, aware of your weaknesses. If your adversary does find out your weaknesses (i.e., does discover your situation and your strategy), von Neumann's strategy will at least assure that you will have opted for, not the highest maximum you could theoretically have achieved, but the highest minimum level down to which you can be forced if found out. Your adversary (let us posit a female) is trying to hold down your maximum score; she will try to discover your position and strategy and then push you down to the lowest maximum she can, which is tolerable to you because you have already opted for the strategy that will give you the best score possible when she is fully informed of your plans. For this most dangerous scenario, you have chosen to seek your *highest minimum* and she will try to force you to what is, from her perspective, your *lowest maximum*, which turns out to be (almost by definition but also by mathematical proof) the same point (i.e., the same score or outcome).[17] This theory and the strategy it promotes are called "minimax."[18]

Of course, with "correct bluffing"[19] and competent play, you will not be readily found out and you will do better than your highest minimum.

Minimax theory favors forsaking the chance for a bonanza to protect yourself against the chance of disaster. It is an application of the principle: at all costs, avoid catastrophe. It is a conservative approach that protects your flanks and rear, then frees you to do the best you can up front. Against other strategies it will be found to have great endurance and good results, to be "robust" over time. It will be hard to beat.[20]

XII. PRISONER'S DILEMMA

Robert Axelrod describes in *Evolution of Cooperation*[21] two international contests which he ran to determine the best strategy for the "[I]terated Prisoner's Dilemma."[22] In this mathematical game, two prisoners again and again must either "cooperate" with each other and say

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[17] *See id.* at 63–65.

[18] *Id.* at 67.

[19] *Id.* at 72.

[20] *See id.* at 67–83.

[21] ROBERT AXELROD, THE EVOLUTION OF COOPERATION (1984).

[22] *Id.* at 14.

nothing to the wardens or "defect" and turn the other in. Each prisoner's choice is revealed to the other at the end of each round. If both prisoners cooperate, they each get three points. If both defect, they each get one point. But the prisoner who defects when the other cooperates gets five, and the fall-guy who cooperates gets zero (the "sucker's payoff").[23]

In both of Axelrod's contests the winning strategy was Tit for Tat—that is: begin the game by cooperating with your fellow prisoner, punish quickly any defection by the other prisoner in the previous round by your own defection in the next, and forgive quickly by returning to cooperation on the very next move *after* the other prisoner stops defecting and starts cooperating again.[24] In other words, Tit for Tat holds out the hand of cooperation at the outset of a relationship, then, if it is swatted aside, will not hold out its hand again until after (and it is immediately after) the other party has held out its hand.

Hundreds of games, each with hundreds of rounds, are played on a computer. Tit for Tat does not win every game, but when it loses, it loses by only a little bit. Over the long haul, as game after game is played, Tit for Tat pulls ahead. Some other strategies for determining whether to cooperate or defect keep up for a while, but the aggregate performance of Tit for Tat is better than any other ostensibly more clever strategy. It does not reach for the maximal theoretical return, but for the best overall return in an interactive, iterative system. It induces the most cooperation.[25]

This mathematical model tells you nothing of nuance, of punishment rendered so graciously it invites a return to cooperation by the other side. But it tells you much about why self-interested humans cooperate as much as they do. It says, "Follow the Golden Rule, but keep your powder dry."

XIII. CONCLUSION

There are the tools. You are welcome to any of them. Happily, when they propagate into your toolbox, they will still be in mine, too. May they serve us both well!

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[23] *Id.* at 8.

[24] *See id.* at 13.

[25] *See id.* at 27–54.